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No. 04-

IN THE
Supreme Court of the United States

John Melvin Alexander, *et al.*,
Petitioners,
v.
State of Oklahoma, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit
Motion for Leave to File Brief and Brief of Amicus Curiae of
Historians In Support Of Appellants

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OF HISTORIANS IN SUPPORT OF APPELLANTS

This motion is made pursuant to Supreme Court Rule 37.2. Permission from the other parties has not been granted for the filing of this amicus brief. Filing of this brief will be helpful to the court as Amicus Curiae is familiar with the issues in this case.

The amici are professional historians. John Hope Franklin, Scott Ellsworth, and Alfred L. Brophy are the foremost experts on the history of the Tulsa Race Riot of 1921 and were retained by the Oklahoma Commission to Study the Riot of 1921 ("Commission") and participated in formulating the findings of its Report of the Riot ("Report") published in 1921. That Report has received awards for its historical contribution as a government document.

Our interest in this case is the ability of professional historians, the lay public, the victims of the Tulsa Race Riot of 1921and the courts to understand and act upon contemporaneous and subsequent accounts of the Riot. In particular, we are interested in emphasizing the tremendous negative effect of the State of Oklahoma ("State") and City of Tulsa ("City")'s censorship, at the time of the Riot and subsequently, of both the historical record and public discussion of the Riot. Indeed, it was not until the Commission published its Report that an objective, informed account of the Riot appeared, thanks to long-missing documents retained by the defendants.

There are few experts upon the impact of the Riot upon the citizens of Oklahoma, or its reception nationally. These issues are central to the problem of accrual: whether the citizens knew they were injured, by whom, and the extent of the cover-up engaged in by Appellees to hide and suppress all evidence of official

participation in the Riot. Amicus Curiae and its Counsel of Record both do so and offer this brief to assist the Court.

Respectfully submitted,

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INTEREST OF AMICI

The undersigned amici are professional historians. Our interest in this case is the ability of professional historians, the lay public, the victims of the Tulsa Race Riot of 1921and the courts to understand and act upon contemporaneous and subsequent accounts of the Riot. In particular, we are interested in emphasizing the tremendous negative effect of the State of Oklahoma ("State") and City of Tulsa ("City")'s censorship, at the time of the Riot and subsequently, of both the historical record and public discussion of the Riot. Indeed, it was not until the Oklahoma Commission to Study the Riot of 1921 ("Commission") published its Report of the Riot ("Report") that an objective, informed account of the Riot appeared, thanks to long-missing documents retained by the defendants.

Plaintiffs in this case are the survivors and their descendants of the 1921 Tulsa Race Riot. Even by the violent standards of Jim Crow segregation, the Riot was extraordinary in intensity, scope and effect. The Riot was the single worst act of terrorism on American soil throughout the Twentieth Century. It is also one of the least well known, thanks to a government-acknowledged "conspiracy of silence" between the State of Oklahoma and the City of Tulsa. *See* the 1921 Tulsa Race Riot Reconciliation Act of 2001, 74 Okl. Stat. Ann. §8000.1 (West 2002). In the Riot's aftermath, the State and City precluded access to the court system first by intimidation and repression of the African American Riot victims, then by censoring the historical record. For eighty years after the Riot, the State and City actively misled the plaintiffs and successfully suppressed the record of their complicity.

Historians researching the history of the Riot first uncovered evidence of official government responsibility in 2001, when the Oklahoma Commission to Study the Riot of 1921 published its Report of the Riot relying on hitherto unavailable documents.[3] The plaintiffs certainly had no knowledge of the conspiracy until then. The Report "transform[ed]" the Riot victims' understanding of events: where before, as one survivor stated, "All I knew was that I was in it," after the Report provided a detailed account emerged specifying the extent of State and City participation in the Riot.[4]

The statute of limitations in this case works a clear wrong by divesting the plaintiffs of their right to compensation for the devastating racist violence visited

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[3] The two most significant accounts of the Riot are SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RIOT OF 1921 (1982) and ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921–RACE, REPARATIONS, RECONCILIATION 46-47 (2002). Brophy's book was published after the Commission to Study published its REPORT OF THE OKLAHOMA COMMISSION TO STUDY THE RIOT OF 1921 (2001) ("Report") and utilized the new materials discovered by the Commission. Scott Ellsworth, in conjunction with John Hope Franklin, published a chapter in the Report, that also relied upon newly-discovered materials and significantly updated Ellsworth's prior account of the Riot, changing the nature of the City's responsibility for the Riot. *See* Scott Ellsworth & John Hope Franklin, *The Tulsa Race Riot,* in TULSA RIOT COMMISSION REPORT 37-89 (2001). *See also* Plaintiff's Supplemental Memorandum of Law in Opposition to Defendant City of Tulsa's Motion to dismiss, Alternative Motion for Summary Judgment, filed Feb. 23, 2004, Exhibit 1 (Declaration of Scott Ellsworth) at 4-5 (discussing importance of newly-found documents for historical record).

[4] Plaintiff's Supplemental Memorandum of Law in Opposition to Defendant City of Tulsa's Motion to dismiss, Alternative Motion for Summary Judgment, filed Feb. 23, 2004, Exhibit 1 (Declaration of Scott Ellsworth) at 5.

upon their whole community during the Tulsa Riot of 1921 and subsequent eight decades of state-sponsored repression. Justice is denied upon the theory that, because plaintiffs knew they had been injured, their claims accrued. The record demonstrates, however, that none of the plaintiffs, the public or even professional historians were *or could have been* aware of the State and the City's responsibility for participating in and encouraging this Riot until the discovery of documents made available by defendants to the Oklahoma Commission to Study the Tulsa Riot of 1921.

The role of historians is pertinent in statutes-of-limitations cases, such as these, in which information necessary to bring suit requires the discovery and comprehension of long-hidden documents. In the instant case, as in *Rosner v. United States*,[5] historians were central to the Commission's effort to reconstitute the historical record so as to evaluate official responsibility. Here, the effect of the passage of time is dispositive to the lawsuit. Historical investigation answered the questions of most importance to the courts: what, based upon the available evidence, the public knew or could have known both at the time of the Riot and before publication of the Report; and (as a subsidiary matter) whether there remains sufficient evidence to apportion legal liability. The historian's efforts were central to the State's acknowledgment that it suppressed the historical record as part of a "conspiracy of silence."

The accrual doctrine employed by the Tenth Circuit continues to preclude plaintiffs' access to justice.

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[5] 231 F.Supp.2d 1202 (S.D. Fla. 2002) (only after Presidential Advisory Commission released its report on holocaust assets that facts necessary for suit came to light). *See also* U.S. Holocaust Assets Commission Act of 1998, PL 105-186 (1998), 1998 S 1900, 22 U.S.C §1621 (West 2005).

It requires an injured plaintiff to file suit against anyone they might suspect caused the injury, even in the absence of evidence to apportion responsibility, and even though the defendants suppressed the facts and misled the plaintiffs. Given the critical issue of the availability of various historical documents to the issue of accrual, and the process of developing an historical record to the issue of equitable relief from the statute of limitations, the undersigned historians and scholars file this brief as amicus curiae in support of Appellants.

INTRODUCTION

There is no doubt that the African American victims of the Tulsa Race Riot of 1921 were aware that they were the victims of white violence. *See Alexander v. State of Oklahoma,* 382 F.3d 1206, 1215 (2004). There is now no doubt that the City of Tulsa ("City") and the State of Oklahoma ("State") are culpable for the acts of violence perpetrated during the Tulsa Race Riot of May 31 through June 1, 1921 ("Riot"). *See id.* at 1219; *see also Alexander v. State of Oklahoma,* Civ. No. 03-133, Order at 21-23 (N.D. Okl. Mar. 19, 2004). In 2001 the State officially and expressly accepted responsibility for creating the climate of racial intolerance that led to the Riot. The State acknowledged that local and county officials,[6] the City of Tulsa, and the City of Tulsa Police Department were "participants in the ... violence which took place on May 31 and June 1, 1921." 74 Okl. Stat. Ann. §8000.1.2. In short: "the Oklahoma Legislature freely acknowledge[s] its moral responsibility on behalf

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[6] *See* 74 Okl. Stat. Ann. §8000.1.1 (West 2002) ("The root causes of the Tulsa Race Riot reside deep in the history of race relations in Oklahoma ... where the goal was to 'put[ ] African-Americans in Oklahoma in their place' and to 'push down, push out, and push under' African-Americans in Oklahoma").

of the state of Oklahoma and its citizens." *Id.* at §8000.1.6.

Furthermore, there is no doubt that the State and City conspired to suppress the historical record of the Tulsa Race Riot of 1921, and particularly their involvement in that Riot. *See id.* at §8000.1.4 Yet, despite the evidence uncovered by the Riot Commission, defendants still refuse to take the blame: the State still denies participating in the Riot;[7] and the City argues that the Riot victims knew of the City's involvement and slept upon their rights, forfeiting their ability to obtain redress in a court of law. *See, e.g., Alexander,* 382 F.3d at 1218-1219.

ARGUMENT

I. The Tenth Circuit's Theory of Accrual Rewards Those Who Successfully Cover-Up The Wrongs They Perpetrate, and Is Contrary to the Justifications Underlying Statute of Limitations

Statues of limitation serve an important purpose: they balance the defendant — and society's — interest in certainty and stability against the plaintiff's enjoyment of his right. Such statutes work best when they protect the diligent defendant who has acquired and relied upon the right against the careless or neglectful plaintiff who fails adequately to prosecute his claim. They work a wrong when they divest the plaintiff of a

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[7] *See, e.g.,* 74 Okl. Stat. Ann. §8000.1 (placing legal responsibility for the Riot with City and County actors, rather than state agents); Lois Romano, *No Vow to Make Amends for Tulsa; Legislators' Sidestepping Disappoints Survivors of 1921 Race Riot,* THE WASHINGTON POST, Thursday, March 1, 2001 Section A (Governor Keating denied the State was responsible for injuries stemming from the Riot).

right without vesting a corresponding right in a defendant.[8]

There has been little advance made upon the theoretical justifications of statutes of limitation since Oliver Wendell Holmes asked and answered the question: "what is the justification for depriving a man of his rights, *a pure evil as far as it goes*, in consequence of the lapse of time?" OLIVER WENDELL HOLMES, THE PATH OF THE LAW 29 (1996) (1897) (emphasis added). The two sets of justifications Holmes identified differ in weight according to the plaintiff's and defendant's perspectives. When viewed from the plaintiff's perspective, he suggested, "the loss of evidence . . . desirability of peace . . . [or] neglect[ing] to enforce his rights" generally provide an insufficient reason for barring suit. *Id.* The real reason for such statutes is to be found in the defendant's perspective, the person who acquires the right through the passage of time and acts upon it without any warning from the plaintiff. *Id.*

Holmes's rationales were essentially adopted by the Court in *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944). The primary plaintiff-focused justification for divesting a plaintiff of his rights using statute of limitations is that the plaintiff is "slumber[ing]," *Order of R.R. Telegraphers,* 321 U.S. at 348, and so relying upon a "garden variety claim of excusable neglect." *Irwin v. Dep't of Veterans Affairs*,

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[8] An evil, furthermore, that has traditionally been recognized as so profound that lawyers may have an ethical duty to refuse to represent a client proposing this defense. *See* DAVID HOFFMAN, A COURSE OF LEGAL STUDIES (1836) (quoted in DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 10 (1988)) "I will never plead the Statute of Limitations, when based on the mere efflux of time; for if my client is conscious he owes the debt; and has no other defense than the legal bar, he shall never make me a partner in knavery, lawyer or not."

498 U.S. 89 (1990). The Court then adopted the "evidentiary" justification in defendant-centered terms, recasting it as a means of "prevent[ing] surprises . . . [when] evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers*, 321 U.S. at 348-49. A slightly different defendant-centered justification depends upon "peace" or "repose": what the Court called "the right to be free of stale claims."[9]

Equitable remedies also take a plaintiff- or defendant-centered perspective and are routinely available to toll the statute of limitations. When filing suit is untimely due to the defendant's affirmative misconduct, defendants are estopped from relying upon the statute; when the relevant facts are unavailable to the plaintiffs through no fault of their own, equity permits the statute to toll. *See Young v. United States*, 122 S. Ct. 1036, 1041 (2002) (citing *Irwin*, 498 U.S. at 96).[10] Extraordinarily, both justifications are present here, along with other equitable considerations that require tolling of the statute of limitations. *See Young*, 122 S. Ct. at 1041 (2002) (citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) (per curiam)) ("tolling might be appropriate in other cases" as well); *see also Rosner v. United States*, 231 F. Supp. 2d 1202, 1209

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[9] *Id.*

[10] Equitable "tolling 'focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant,' [while] estoppel 'focuses on the actions of the defendant.'" *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1184 (9th Cir 2001) (en banc) (citations omitted). There is "clearly some overlap," *id.*, between the two doctrines and they are often conflated. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1056 (2d ed. Supp. 2001) (courts themselves often "use the terms 'equitable tolling' and 'equitable estoppel; interchangeably or incorrectly").

(S.D. Fla. 2002) (tolling warranted where there are extraordinary circumstances); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 135 (E.D.N.Y. 2000) (same).

A. Defendants Engaged in a Process of Intimidation Designed to Prevent Plaintiffs Filing Suit

To rebut the inference that plaintiffs were neglectfully slumbering upon their rights, plaintiffs need only show that they were deprived of vital information bearing on the existence of a claim and that their ignorance was caused without any fault or lack of diligence on their part by circumstances beyond their control', *see, e.g. Rosner v. United States*, 231 F.Supp.2d 1202, 1209 (S.D. Fla. 2002), and that these circumstances go beyond a "garden variety claim of excusable neglect." *Irwin*, 498 U.S. at 96. The plaintiffs in this case were the victims of government-sponsored violence and repression that lasted long after the Riot itself. On the one hand, the government sought to deny the plaintiffs access to evidence of government culpability; on the other, the government sought to intimidate the plaintiffs from filing suit. The government only made the necessary evidence available in 2001; it has never demonstrated a willingness to open the courts to the plaintiffs. Accordingly, plaintiffs' failure to file suit before 1921 is the result of circumstances other than neglect.

The plaintiffs in this case were the victims of government-sponsored misconduct and misinformation that precluded them from identifying the government's complicity in the Riot. While such circumstances are not unique in American history, they are extraordinary: comparable incidents are limited to the Japanese-

American internment, *see Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal. 1984) (Government deliberately omitted relevant information and provided misleading information to plaintiffs preventing them from filing suit); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (same); the Tuskegee Syphilis experiments, *see Pollard v. United States*, 384 F.Supp. 304 (M.D. Ala. 1974) (fraudulent concealment by government delaying plaintiffs' discovery of the existence of their claims) and the misappropriation of Nazi gold, *see Rosner*, 231 F.Supp.2d at 1209; *Bodner v. Banque Paribas*, 114 F. Supp. 2d at 135. Courts have not hesitated to find that these extraordinary circumstances justified the tolling of the statue of limitations.

The Tulsa Race Riot of 1921 stands as the worst of the many manifestations of racial animus in the three decades following this Court's decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Within two years of *Plessy* a series of race-based massacres that swept the nation, North and South, East, West and Midwest: Wilmington, North Carolina in 1898; Brownsville, Texas and Atlanta, Georgia in 1906; Springfield, Illinois in 1908; East St. Louis, Missouri and Houston, Texas in 1917; Philadelphia, Pennsylvania and Nashville, Tennessee in 1918; and the Red Summer of 1919 which saw massacres in Charleston, South Carolina, Longview, Texas, Chicago, Illinois, Knoxville, Tennessee, Elaine, Arkansas, Omaha, Nebraska, and Washington D.C. After the Tulsa Race Riot, there were race-based massacres in Rosewood, Florida in 1923 and in Detroit, Michigan in 1943. Throughout this time, thousands of African Americans were lynched around the country.

What *does* make the Tulsa Race Riot unique is the scope of the violence. Based entirely upon the

Commission's Report, the State legislature acknowledged as much, finding that:

> The staggering cost of the Riot included the deaths of an estimated 100 to 300 persons, the vast majority of whom were African-Americans, the destruction of 1,256 homes, virtually every school, church and business, and a library and hospital in the Greenwood area, and the loss of personal property caused by rampant looting by white rioters. The Riot Commission estimates that the property costs in the Greenwood district was approximately $2 million in 1921 dollars or $16,752,600 in 1999 dollars.

74 Okl. Stat. Ann. §8000.1.3. According to the Commission Report, "The 1921 riot is, at once, a representative historical example and a unique historical event. It has many parallels in the pattern of past events, but it has no equal for its violence and its completeness."[11]

Even a cursory summary discloses that the Riot represented an unprecedented breakdown of the rule of law, in which police officers, special deputies, and local units of the National Guard joined together to put down what was termed a "negro uprising."[12] In the process, those governmental officers — representatives of the Oklahoma state and local government — used the mechanism of law and all the power of that the state could to round up every Black person in Greenwood, take them into custody, then loot and burn Greenwood.[13]

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[11] Report at 19.

[12] *See, e.g.*, BROPHY, RECONSTRUCTING THE DREAMLAND at 43 (National Guard report referring to "Negro Uprising").

[13] *See Civic Workers Care for Negroes Held in Concentration*

No other riot manifested the level of governmental involvement in both perpetrating and covering up the Riot. As a direct consequence of the Riot, the 8,000 African American citizens of the Greenwood District of Tulsa lost their homes; 5,000 of those were detained in camps by the State and City; the other 3,000 fled Tulsa, many never to return. In the aftermath of the Riot, the state and federal relief was so completely unavailable to the victims that they could not achieve justice through the court system. *See Alexander,* Civ. No. 03-133, Order at 21-22 (apportioning responsibility for the Riot); *Alexander,* 382 F.3d at 1219 (same). The Tulsa Riot was, quite simply, a singular event in American history — unique in terms of violence, governmental culpability, and the inability of riot victims to later obtain redress.

The Riot victims did attempt to obtain redress in the aftermath of the violence. Nonetheless, those who filed suit found their cases held in legal limbo. The District Court unequivocally found that the State and City's actions precluded the plaintiffs from timely filing their claim for the approximately fifty years following the Riot:

> [The] *legal system . . . was openly hostile to them, courts . . . were practically closed to their claims, [the] City . . . blamed them for the Riot and actively suppressed the facts, [in] an era*

Camps, TULSA TRIBUNE 4 (June 1, 1921); *Sunday Services at Concentration Camp*, TULSA WORLD 6 (June 6, 1921) (cited in Plaintiffs' Response to Defendant City of Tulsa's Motion to Dismiss, Alternative Motion for Summary Judgment and Brief in Support, filed Jan 6, 2004, Exh. 5 at 43 (Affidavit of Alfred L. Brophy, *Racial Legislation, Violence, and the Breakdown of Law in the Tulsa Riot Era*).

> *of Klan domination of the courts and police force, and the era of Jim Crow.* . . . Both the Commission Report and the Legislative Findings and Intent resulting from that Report catalog the *horror and devastation of the Riot as well as the intimidation, misrepresentation and denial that took place afterward. The political and social climate after the riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights.*

Alexander, Civ. No. 03-133, Order at 21-22.

The record is replete with evidence of "intimidation, fear of a repeat of the Riot, inequities in the justice system, Klan domination in the courts, [and] an the era of Jim Crow, *id.* at 22, all of which contributed to an environment inimical to timely filing. Plaintiffs reasonably believed that the courts would not grant relief to African Americans whom public opinion had settled were responsible for the Riot. For eighty years the State and City enforced the belief that that the Greenwood community was to blame for the Riot and that they had no right to relief.

Even if the plaintiffs were aware of State and City culpability in the Riot — the vital circumstances necessary to bringing suit — extraordinary circumstances are present that require tolling the statute of limitations.

Referencing cases where the statute of limitations was suspended because of the extraordinary circumstances that resulted from the "brutal reality of the Holocaust,"[14] and where intimidation, fear of reprisal

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[14] Order at 21 (citing *Rosner v. United States*, 231 F.Supp.2d 1202,

and the unavailability of the courts prevented timely filing,[15] the District Court and the Tenth Circuit correctly found that tolling was appropriate in this case, but sought to blame the plaintiffs for their failure to file upon learning of the end of Jim Crow. *See, e.g., Alexander,* 382 F.3d at 1216. In the cases cited by the courts, as with the instant case, the parties knew they had been injured. The state sponsored intimidation and repression, however, ended almost *sixty years* prior to filing suit,[16] and the targeted government entity was *innocent* of that intimidation and repression.[17] In the instant case, the courts found that government's malicious acts ended more recently — between twenty and forty years ago — and that the government entities were *precisely those guilty of engaging in the intimidation and repression.*

In fact, *these Plaintiffs in particular* continued to labor under extraordinary conditions. The Tulsa Riot victims, specifically, were subjected to a set of circumstances unlike any other African-Americans in Oklahoma or nationwide. Many of them fled Oklahoma in the wake of the Riot and were too disturbed by the Riot to return. Those who remained in Oklahoma lived in the lap of their tormentors. They were required to remain silent: their suffering was denied, their reality revised to fit a racist myth.

Having imposed this code of silence, having

1209 (S.D. Fla. 2002)).

[15] *Id.* (citing *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996)).

[16] World War II ended in 1945; the circumstances giving rise to oppression ended with it. That is not the case for the Tulsa victims whose oppression lasted, in many instances, long after, as the courts recognized.

[17] In *Rosner*, the government entity is the United States, which actually fought a war on the side of the plaintiffs in that case.

enforced it by brutal repression, defendants seek to hold plaintiffs responsible for not realizing that the code was lifted at the end of Jim Crow. There was, however, no announcement, no apology, no acknowledgement by the State, the City or the citizens of Tulsa. There was no publicizing the Riot, no conversation begun. The schoolbooks, which are adopted by the State of Oklahoma, continued — and continue — to elide the Riot from the State's history or to misrepresent governmental participation in and responsibility for the Riot.

The plaintiffs are certainly not at fault for failing to understand that circumstances had changed. These are not neglectful plaintiffs, but fearful ones; they were not slumbering, but all too awake to the reality of silence and intimidation. The mere passage of time and the possibility of a change of heart on behalf of the government and people of Oklahoma is insufficient to break the code of silence imposed in 1921 and perpetuated by three generations of Oklahomans. The clear message was that the State, City, and people of Oklahoma wished to continue the silence, and until the publication of the Commission Report in 2001 no-one said otherwise.

These circumstances are truly extraordinary. It is disingenuous and unrealistic to expect that Tulsa Riot victims — victims of state-sponsored terror who had been told by official actors that they had no right to relief — would, upon the termination of formal Jim Crow, file claims against defendants. Only once the Tulsa Riot Commission issued its report in February 2001 — and the state legislature acted to accept and acknowledge the report in May 2001 — did Tulsa Riot victims have some measure of comfort that asserting their rights was a possibility. It was naive of the courts

to conclude that extraordinary circumstances ceased to exist upon the eradication of the Jim Crow laws.

The Tulsa Riot victims have for all intents and purposes been conditioned to believe — not unreasonably — that they had no realistic expectation of legal relief in the judicial system, and that if they attempted to assert their rights, they might be met with violence and retribution. The Complaint sets forth the extraordinary and unprecedented nature of the Riot and its aftermath that resulted in the plaintiffs' continued fear long after the dismantling of Jim Crow. Those who even spoke of the Riot faced threats of violence.

In sum, given the unique brutality of the Tulsa Riot, the unique level of government culpability and the unique circumstances under which evidence was buried, Plaintiffs have adequately alleged facts that would support the conclusion that they were de facto prevented from bringing suit even after the end of Jim Crow segregation. The extraordinary conditions that prohibited the plaintiffs' timely filing continued long after Jim Crow laws were taken off the books.[18] The courts erred in concluding otherwise.

B. The State and City's Intimidation and Censorship Estop Them for Enforcing Statute of Limitations

It is a central tenet of the equitable nature of tolling — and one that comports with Holmes's

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[18] Of course, this assumes that the clock had already begun to run. But that, too, is a conclusion that the District Court should not have reached on a motion for summary judgment. Plaintiffs alleged that they were victims of a "conspiracy of silence" that prohibited them, until the publication of the Commission Report, from learning the facts that would reveal the responsibility of *these governmental defendants* for the harms suffered in the Riot. For this independent reason, as well, it was error for the Court to dismiss the case on statute-of-limitations grounds.

defendant-centered justification — that "no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statute of limitations."[19] The Court permits equitable tolling "where the claimant has . . . been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass,"[20] "or affirmative misconduct on the part of a defendant lulled plaintiff into inaction."[21]

Put simply, the estoppel doctrine explains why a defendant cannot rely upon his own misconduct to assert the statute of limitations. Where the defendant has misappropriated a right by his own affirmative acts, the passage of time fails to afford a strong justification for enforcing that right.

In the instant case, the equities are tipped more drastically against the defendants. Their actions in the aftermath of the Riot indicate that they executed a pattern and practice of censorship and repression to silence the Riot victims and frustrate their access to justice. The acknowledged goal of the State and City was to silence all talk of the Riot. According to the legislature:

> Perhaps the most repugnant fact regarding the history of the 1921 Riot is that it was virtually forgotten . . . for seventy-five (75) years. This "conspiracy of silence" served the

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[19] *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232-33 (1959)

[20] Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990).

[21] *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (per curiam).

> dominant interests of the state during that period which found the riot a "public relations nightmare" that was "best to be forgotten, something to be *swept well beneath history's carpet*" for a community which attempted to attract new businesses and settlers.[22]

The whole point of government intervention in "Oklahoma . . . race relations [was to] allow[ ] one race to 'put down' another race."[23]

The State and City jointly engaged in the enterprise of hiding and suppressing the relevant evidence of their participation. Shortly after the Riot, the Oklahoma attorney general convened an all-white grand jury investigation that laid blame squarely on Greenwood residents.[24] The Mayor likewise blamed Greenwood residents–and was seemingly pleased that Greenwood had been destroyed.[25] The State issued indictments against a number of key Greenwood residents. Many of those Greenwood residents who did not flee because of the violence of the Riot were soon driven out by threats of prosecution or further violence.[26]

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[22] 74 Okl. Stat. Ann. §8000.1.4 (emphasis added).

[23] *Id.* at §8000.1.3

[24] TULSA WORLD 1, 8 (June 26, 1921).

[25] *Public Welfare Board Vacated by Commission: Mayor in Statement on Race Trouble*, TULSA TRIBUNE 1 (June 14, 1921) (reprinting Mayor T.D. Evans speech to City Commission (June 14, 1921)).

[26] The *Tulsa Tribune* reported on June 5 that a "general exodus of negroes from the city has taken place since the rioting ceased Wednesday. . . . An approximate estimate was made last night that between 1,000 and 1,500 of them have left in the last three days. They have been purchasing tickets for every city from New York to San Francisco." *All Trains out of City Jammed with Refugees*, TULSA TRIBUNE (June 5, 1921). Meanwhile, other cities were disarming their Black residents–a frequent indicator that more violence was on

By 1923, the State and City were effectively under the control of the Ku Klux Klan.[27] Although some Greenwood residents filed lawsuits in 1922 and 1923,[28] they could not obtain relief because the courts were effectively closed to them.

The state in particular re-wrote the history, portraying the National Guard as the saviors of the African Americans, who were held "for their own protection" from the rioting white mob. In fact, the Guard systematically rounded up African Americans throughout the night of the Riot, going so far as to kill those who would not leave their houses.[29] The proper description of the State and City action is not that they passively stood by while the Riot progressed, but one of bloody intervention by City and the State as part of a policy and plan of destruction.[30] The systemic and planned nature of that intervention was not apparent to anyone, victim or historian, until the records became available, so successfully did the State and City's conspiracy of silence work.

The State and City suppressed all evidence of that participation in the Riot and promptly engaged in a concerted cover-up. For example, a Grand Jury, at the behest of the State, passed indictments against a number of African Americans blaming them for the Riot.[31]

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its way.

[27] For a discussion of historians' understanding of the complex history of the Klan in Oklahoma in the 1920s, *see* Brophy affidavit, 59.

[28] *See, e.g.*, Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law*, in TULSA RIOT COMMISSION REPORT 153, 166 (2001).

[29] *See, e.g.*, BROPHY, RECONSTRUCTING THE DREAMLAND at 43.

[30] *See* Report, 10-15, 19.

[31] *See* ALFRED BROPHY, RECONSTRUCTING THE DREAMLAND at 95-97.

While the African American Riot victims filed over one-hundred lawsuits, many alleging claims against the State and City, all the suits were dismissed.[32] A Native American, William Redfearn, filed the only suit to avoid dismissal, against an insurance company that had refused to pay his claims on a building burned in the Riot. *See Redfearn v. American Central Ins. Co.*, 243 P. 929 (Okla. 1926). In *Redfearn*, the Oklahoma Supreme Court held that State and City responsibility determined the issue of recovery: if the fires were caused by State or City agents in an effort to flush African Americans out of their buildings, the insurance contract's "riot" exception would not operate. *Id.* at 931.

The *Redfearn* court noted that "a great number of men engaged in arresting the negroes found in the negro section wore police badges, or badges indicating they were deputy sheriffs, and in some instances were dressed in soldiers' clothes and represented to the negoes that they were soldiers." *Id.* The court concluded, however, that "[t]here was *no evidence that the men wearing police badges or sheriff's badges were in fact such officers or acting in an official capacity.*" *Id.* (emphasis added). Accordingly, by 1926 the official version of the Riot, endorsed by the highest court of the State of Oklahoma, had endorsed a version of events that was to predominate for the next seventy-five years: the Riot was started by African Americans, *id.* at 929, the precipitating event was the killing of a white man, *id.*, and neither the State nor the City participated in the Riot, except to rescue African Americans from the white mob.

Evidence of official complicity in the Riot did

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[32] *See* ALFRED BROPHY, RECONSTRUCTING THE DREAMLAND at 69-87, 95-102.

not surface until the Riot Commission received the contents of the Attorney General's Civil Case Files from the Oklahoma State Archives. Those files contained the testimony necessary to demonstrate that the Supreme Court was wrong to clear the State and City of responsibility. On the basis of documents that became available for the first time, Scott Ellsworth was able to engage in a painstaking reconstruction of the course of the Riot through Greenwood, hour by hour. So powerful and damning was this testimony, presented at a public hearing in Greenwood, that even the Riot Commission refused to incorporate it in its final Report.[33]

None of this information was available to Scott Ellsworth, the principal historian of the Riot, prior to the creation of the Commission. Up to that point, State and City officials had been generally uncooperative and had on specific occasions resisted Ellsworth's attempts to discover the details of the Riot or had destroyed relevant documents. It was only upon the creation of the Riot Commission that the State and City began to cooperate in producing the relevant documents. Among the hitherto unavailable documents produced were those sufficient to establish State and City liability.[34]

Both District and Circuit Courts relied upon Scott Ellsworth's book, *Death in a Promised Land*, to help set the date of accrual. That book details some of the Riot history; it differs in significant respects from his contribution to the Riot Commission's Report. Prior to the Report, Ellsworth presents no information of State or

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[33] *See* Plaintiff's Supplemental Memorandum of Law, filed Feb. 23, 2004, Exhibit 1 (Declaration of Scott Ellsworth) at 4-5 (discussing reception of testimony on progress of Riot).

[34] Plaintiff's Supplemental Memorandum of Law, filed Feb. 23, 2004, Exhibit 1 (Declaration of Scott Ellsworth) at 4-7.

City complicity not available in the *Redfearn* opinion.[35] Ellsworth's book cites no evidence, testimonial or documentary, for any of its claims that the City deputized members of the white mob.

The Commission Report contained testimony, relied upon by Ellsworth and Brophy, that City officials had ordered deputies to attack the African American citizens of Greenwood.[36] Ellsworth's reconstruction of the Riot's progress revealed the State's complicity in burning homes and killing African Americans.[37] None of this information was available to these historians, or the plaintiffs, prior to 2001. The Commission Report contains the first historical support for the proposition that, "Vigilantes . . . *under the color of law*, destroyed the Black Wall Street of America."[38] The Commission discovered this information in the face of six decades of public denials by the city and state of any culpability for the riot and in the absence of any public material to the contrary.

Without the Commission's Report, any attempt at legal redress were futile as a matter of law.[39] The 1982

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[35] *Id.*

[36] Report at 64; 159; 165; 97 n.112; 171 n.31

[37] Plaintiff's Supplemental Memorandum of Law, filed Feb. 23, 2004, Exhibit 1 (Declaration of Scott Ellsworth) at 4-5.

[38] Report at viii (emphasis added).

[39] *See Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984) ("the cover-up and resistance of the investigating police officers rendered hollow his right to seek redress"); *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982); *Stoelson v. United States*, 629 F.2d 1265, 1270 (7th Cir. 1980) (official documentation of causation necessary: "even armed with the occupational safety expert's opinion and the union newspaper article, the suggestion that Mrs. Stoleson had a claim that she could judicially enforce is implausible"); *Liuzzo v. United States*, 485 F. Supp 1274, 1282 (E.D. Mich. 1980)("the official version of the Liuzzo murder was that three Klansmen were solely responsible .... the plaintiffs, as well as judges,

reference to "special deputies" in Ellsworth's *Death in a Promised Land* conveyed no new information — certainly nothing not contained in *Redfearn*. Ellison's account suggests that if the properly-deputized officers aided the rioters, they did so *unlawfully*. Such spontaneous activity on the part of the rioters could not impose liability in 1982 any more than it did in 1926.[40]

The animating purpose behind the defendants' actions since the Riot has been to suppress the truth, oppress the victims, and wait for memories to fade and witnesses to die. Before the Commission's Report, the Riot victims *could not be aware* of the State and City's culpability in perpetrating this act of hate-filled violence. It was only thanks to the work of the Riot Commission historians, John Hope Franklin, Scott Ellsworth and Alfred L. Brophy, that the plaintiffs gained the means for challenging the official version of events.

It is undisputed that the plaintiffs knew they were injured. They did not and could not know that the State and City engaged in a policy designed to injure them, because the State and City conspired to hide that fact. At the time of the Riot, all that was apparent was that a mob of white citizens had decided to burn down the Greenwood district of Tulsa. The Tenth Circuit's theory of accrual rewards those who successfully cover-up the wrongs they perpetrate, and is contrary to the justifications underlying statute of limitations. *See*

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jurors, and citizens of this country were led to believe [this story] was true.□).

[40] A municipality may not be sued under 42 U.S.C. §1983 for the acts of others: it is only responsible for its own acts. *See Monell v. Dept. of Social Servs.*, 436 U.S. 658, 691-694 (1978); *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion). Plaintiffs could not sustain a §1983 claim against the City simply on the basis that the rioting mob were employed by the town.

Alexander, 382 F.3d at 1215.

C. State and City Participation in Re-Investigating the Causes of the Riot Negates Defendants' Claim of Repose

Where, by commissioning and cooperating with the Riot Commission, defendants take affirmative steps to recreate an historical record and re-open a controversy that has been closed for eighty years, notions of surprise, lack of evidence and repose are inapposite. *See, e.g.*, *Rosner*, 231 F. Supp. 2d at 1209 ("It was only in October 1999, when the Presidential Advisory Commission on Holocaust Assets released its report on the Gold Train that the facts necessary to file their Complaint came to light.").

Defendants Oklahoma and the City of Tulsa themselves opened up the evidentiary record and liability issue through the creation, operation and participation in creating the record and Report of the Commission, thereby acknowledging that it does not have any significant, legitimate interest in repose with respect to its responsibility for harm suffered in the Tulsa Riot.

Statutes of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers*, 321 U.S. at 348-49.

But such evidentiary concerns are nonexistent in this case, where the record is more robust than it was in 1921. Evidence has been found, memories have been jogged and recorded, and witnesses have surfaced unlike any other time in history — all as a result of the

Commission's investigation and Report. Where Defendants have concealed vital information about their culpability and created conditions impeding Plaintiffs from seeking redress, Defendants should not be able to benefit by hiding behind the statute of limitations.

Furthermore, the State of Oklahoma has passed a statute acknowledging that neither the State nor the City have any significant, legitimate interest in repose with respect to its responsibility for harm suffered in the Tulsa Riot. In sum, the risk of surprise in this case is minimal and the need for equity great.

CONCLUSION

The historical significance of the Tulsa Race Riot cannot be underestimated. In scope and violence, it is unlike any Riot in American history. In spite — or because — of that, the State and City have endeavored to suppress and censor the historical record and silence the victims. The courts' interpretation of the statute of limitations has perpetuated this suppression, holding the plaintiffs responsible for sleeping on their rights. In fact, the defendants and the citizens of Tulsa have misled and intimidated these defendants for generations. For the aforementioned reasons, amici conclude that the courts' use of the accrual doctrine to deny plaintiffs' claims is unsupported by the historical evidence and bases the failure to toll the statute of limitations upon an erroneous interpretation of both history and law.

Respectfully submitted,

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